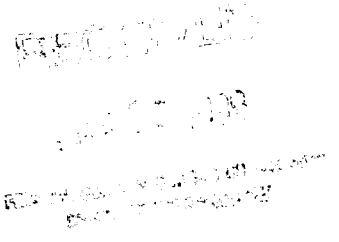
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996	)	MM Docket No. 97-247

To the Commission:



PETITION FOR RECONSIDERATION

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SUMMARY

The Commission's perfunctory conclusion that home shopping, infomercial and direct marketing programming provided over a digital TV bitstream are not "ancillary or supplementary services" subject to a fee is arbitrary and capricious and contrary to Section 336(e) of the Communications Act. Section 336(e) requires that fees be imposed on those digital TV services "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party." Direct sales presentations such as home shopping, infomercial and direct marketing programming fit squarely under that definition when programmers pay broadcasters a per-transaction fee or similar compensation in exchange for broadcasting the material.

The Commission provides two rationales for exempting home shopping and like programming from fees. Neither can override the plain language of the statute. First, the Commission finds that because direct sales presentations are "existing" services, they should not be subject to fees. But Congress did not grandfather or otherwise exempt "existing" services. Therefore, the Commission has no authority to exempt from fees a service that meets under the definition of "ancillary or supplementary" and is provided over a digital TV frequency.

The Commission's second rationale is unclear, because it is internally inconsistent. The Commission says first that direct sales presentations are "commercial advertisements" which are expressly excluded from fees. However, in the very next sentence, the Commission contradicts itself and says that these presentations are "free over-the-air television services, ***supported*** by commercial advertisements."

Direct sales presentations like home shopping and infomercials are either "programming"

services subject to a fee, or they are "commercial advertisements" exempt from fees. In fact, the Congress, the Commission and industry itself have treated these services, from their inception, as "programming" and not as "commercial advertisements." Without a rational basis for reversing years of unfailing precedent, the Commission has no choice but to reverse its ill-considered decision and apply fees to compensation a broadcaster receives from a third party for transmitting direct sales presentations.

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The Office of Communication Inc., of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum and Media Access Project ("UCC, *et al.*") respectfully seek reconsideration of Paragraphs 39-40 of the Commission's *Report and Order*, FCC No. 98-303 (released November 19, 1998) ("*R&O*").

INTRODUCTION

UCC, *et al.* seek reconsideration of one issue - whether home shopping, infomercial and direct marketing programming are subject to fees imposed on digital TV "ancillary or supplementary services" because they are services "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party." *See* 47 USC §336(e)(1)(B). The Commission's perfunctory conclusion that these services are not subject to fees fails to articulate any rational basis for the decision. It is contrary to the plain language of the Section 336(e) of the Communications Act, and otherwise arbitrary and capricious.

ARGUMENT: SECTION 336(e) OF THE COMMUNICATIONS ACT REQUIRES THE FCC TO IMPOSE "ANCILLARY OR SUPPLEMENTARY" FEES ON HOME SHOPPING, INFOMERCIAL, DIRECT MARKETING AND OTHER SERVICES FOR WHICH A PER-TRANSACTION OR OTHER FEE IS PAID.

Adopted as part of the Telecommunications Act of 1996, Section 336(e) of the Communications Act requires the FCC to impose fees on "ancillary or supplementary services" provided over digital TV frequencies if the services are those

> A) for which the payment of a subscription fee is required in order to receive such services, or
>
> B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required).

47 USC §336(e)(1).

Section 336(e)(1) is the only place in the 1996 Act where the term "ancillary or supplementary services" is defined.

In their comments, UCC, *et al.* argued that the plain language of the statute directs the Commission to impose fees on home shopping, infomercial, direct marketing and other services for which broadcasters receive a per-transaction fee or similar compensation. UCC, *et al.* Comments at 12-13. Whenever a licensee "directly or indirectly receives compensation" from a third party in exchange for transmitting programming other than commercial advertisements, UCC, *et al.* asserted that the Commission had no choice but to impose fees. *Id.* The "third party" could be any program supplier, including an infomercial producer, home shopping network or direct marketer.

The Commission dispensed with UCC, *et al.*'s argument in one paragraph, declining to impose fees on such services because:

> The purpose of this proceeding is not to exact fees from existing broadcasters for existing services, but rather, to design a program for the assessment of fees on ancillary or supplementary services which will be provided on the DTV bitstream. We agree with the commenters who argued that home shopping and infomercials are commercial advertisements, excluded by statute from the scope of ancillary and supplementary services....We therefore find that home shopping channels and infomercials are free, over-the-air television services, supported by commercial advertisements, and not subject to a fee.

R&O at ¶40.

As discussed below, the Commission's decision is arbitrary and capricious. ***First***, the Commission does not have the authority to exempt "existing" television services from fees if they otherwise fall within the definition of "ancillary or supplementary services" provided in Section 336(e). ***Second***, the holding is internally inconsistent - declaring that home shopping is "programming supported by commercial advertisements" and at the same time asserting that home shopping and like programming are also themselves "commercial advertisements" that are expressly exempt from the fees.

In fact, Congress, the FCC and the programming providers themselves have always referred to their services as "programming," and not as "commercial advertisements." In the absence of a reasoned basis for reversing this unfailing precedent, the Commission must impose fees on home shopping and like programming when a licensee receives compensation from a third party in exchange for transmitting the programming. *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 42 (1982).

A. Whether Home Shopping and Like Programming are "Existing" Services is Irrelevant For the Purposes of Section 336(e).

The Commission's first rationale for declining to impose "ancillary or supplementary

services" fees on home shopping and like programming is because to do so would "exact fees from existing broadcasters for existing services." *R&O* at ¶40. The Commission opines that this would run contrary to the "purpose of this proceeding" because that purpose was to "design a program for the assessment of fees on ancillary or supplementary services which will be provided on the DTV bitstream." *Id.*

The Commission's circular logic is contrary to the plain language of Section 336. As the Commission states, an "ancillary or supplementary service" provided on a DTV bitstream is subject to a fee. Congress did not grandfather or otherwise exempt "existing" services. Any program which meets the definition of an "ancillary or supplementary service" under Section 336(e) must be treated as feeable.[1]

The Commission has no authority under the statute to draw a distinction between "existing" services and new services for the purpose of imposing fees. While "ancillary or supplementary services" are mentioned in several portions of Section 336,[2] they are defined only in Section 336(e). Nothing in that Section or in the rest of Section 336 permits the FCC to

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[1]The Commission's interpretation of the statute, even if it were permissible, would open the door to demands that all other "existing" services be grandfathered, including existing subscription services. If a subscription service has been commercially employed in a test market, a broadcaster might claim exemption because it was an "existing" service at the time the Commission released its *R&O*.

[2]Section 336 of the Communications Act, *inter alia*, requires the FCC, if it issues licenses for digital television services (referred to as "advanced television") to permit broadcasters to provide "ancillary or supplementary" services over those frequencies. See 47 USC 336(a)(2). Section 336 requires the FCC to ensure that such services 1) are "consistent with the technology or method designated by the Commission for the provision of" digital television, 47 USC §336(b)(1); 2) "avoid derogation of" advanced television services, 47 USC §336(b)(2); 3) are subject to the same rules governing providers of similar services, except for "must carry," 47 USC §336(b)(3); and 4) "are in the public interest." 47 USC §336(d).

exempt "existing" services from fees if they otherwise meet the definition for feeable services set out in Section 336(e). As discussed below, home shopping and like programming transmitted via digital television fall squarely within that definition.

B. Home Shopping, Infomercials and Direct Marketing are "Ancillary or Supplementary Services" Subject to a Fee Under Section 336(e).

The Commission's second rationale for declining to assess fees on home shopping and like programming is, apparently, that "home shopping and infomercials are commercial advertisements excluded by the statute from the scope of ancillary and supplementary services...." However, in the very next sentence, the Commission contradicts itself, stating that "we...find that home shopping channels and infomercials are free-over-the-air television services, ***supported*** by commercial advertisements." *Id.* [Emphasis added]

This inconsistency, in itself, is arbitrary and capricious. Direct sales presentations are either one, but not both, of the two alternatives. They are either programming services subject to a fee (because they are those "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party...,") or they are commercial advertisements exempt from fees.[3]

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[3]If the Commission ultimately determines that home shopping and like programming are "commercial advertisements," it should expressly acknowledge that such an action would authorize commercial broadcasters to run commercial advertisements 24 hours each day. This excessive commercialization is contrary to the Communications Act. *See En Banc Programming Inquiry*, 44 FCC 2303 (1960)("With respect to advertising material the licensee has the additional responsibility to take all reasonable measures...to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages.") The Commission has bound itself to address such abuses. *UCC v. FCC*, 707 F.2d 1413, 1438 (D.C. Cir. 1983)("The Commission may well find that market forces alone will not sufficiently limit overcommercialization. In that event, we trust the Commission will be true to its word and will revisit the area in a future rulemaking proceeding.") Even if the Commission determines that home shopping and like services are "programming"

Congress, the Commission and the industry itself have always described home shopping and like services as "programming," and not as "commercial advertisements." Thus, the Commission must treat home shopping and like services as "programming" services, and not as "commercial advertisements" exempt from Section 336. When, as is the typical case, the licensee receives compensation from a third party in return for transmitting home shopping, infomercial and direct marketing services furnished by that third party,[4] a fee must be applied to that compensation.

1. Section 4(g) of the 1992 Cable Act.

Congress examined home shopping services in depth when it passed Section 4(g) of 1992 Cable Act. The law required the FCC to conduct a proceeding to determine whether "broadcast

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and not "commercial advertisements," their content would still be commercial matter that does no more than propose sales transactions. Thus, stations predominantly devoted to such programming are similarly engaged in excessive commercialization contrary to the Communications Act. Despite the D.C. Circuit's command that the Commission address overcommercialization, the agency has permitted a Petition for Reconsideration squarely raising the issue to languish for nearly five and one half years. *See* Petition for Reconsideration filed by the Center for the Study of Commercialism in MM Docket No. 93-8, *Home Shopping Station Issues*, August 23, 1993.

[4]As described in UCC, *et al.*'s Comments at 13-14, payment from a home shopping program producer to a broadcaster is typically related to product sales. *See* Home Shopping Network, Inc. Form 10K405 filed with the Securities and Exchange Commission, March 31, 1997, found at http://www.sec.gov/Archives/edgar/data/791024/0000950144-97-003467.txt. With respect to infomercial programming, any number of arrangements may govern how a broadcaster receives payment. In some cases, the infomercial provider pays the broadcaster to air the programming. In others, the infomercial provider agrees to share the proceeds from sales with the broadcaster, or the broadcaster may receive a "per inquiry" fee from the infomercial provider. *See* Les Brown's Encyclopedia of Television at 276 ("Stations [airing infomercials] are compensated with commissions on the quantity of products sold in their markets.") New interactive digital technologies, which permit instantaneous purchases during regular TV programming, may also give digital TV broadcasters an opportunity to obtain per-transaction compensation. *See* Gary H. Arlen, "Making the Transition: A New Kind of Television - Rethinking Broadcast TV for the Digital Age" at 21-22 (April 1998) attached as an appendix to UCC *et al.*'s Comments.

television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience and necessity." 47 USC §534(g). The plain language of the law is clear. Congress considered these services to be "programs," and not "commercials." For example, Congress required the FCC to consider specific factors in undertaking the proceeding, including:

> the viewing of such stations, the level of competing demands for the spectrum allocated to such stations and the role of such stations in providing competition to nonbroadcast services offering similar ***programming***.

Id. [Emphasis added]. If the Commission were to determine that such stations were not serving the public interest, then Congress mandated that

> the Commission shall allow the licensees of such stations a reasonable period of time within which to provide different ***programming***, and shall not deny such stations a renewal expectancy solely because their ***programming*** consisted predominantly of sales presentations or program length commercials.

Id. [Emphases added].

The legislative history of Section 4(g) similarly demonstrates that Congress thought of home shopping and like services as "programming" and not as "commercial advertisements." The Conference Report described it thus:

> Subsection (g) requires the FCC to commence an inquiry within 90 days of enactment to determine whether broadcast television stations whose ***programming*** consists predominantly of sales presentations are serving the public interest, convenience, and necessity. The FCC must take into consideration the viewing of such stations, and the role of such stations in providing competition to nonbroadcast services offering similar ***programming.*** In the event that the FCC concludes that one or more of such stations are not serving the public interest, convenience and necessity, the Commission shall allow the licensees a reasonable period within which to provide different ***programming*** and shall not deny such stations a renewal expectancy due to their prior ***programming***.

H.Rep. 102-862, 102nd Cong., 2d Sess. at 69 (1992). [Emphases added].

2. Commission Precedent

Commission precedent is consistent with these legislative pronouncements. The Commission has never deviated from the view that home shopping services are a programming format, and has also differentiated infomercials from what are normally considered "commercial advertisements."

a. Home Shopping

From the very early days of home shopping, the Commission has considered the offering of goods for direct sale to be a form of "programming" and not "advertiser-supported" television. In a 1987 case involving a challenge to the transfer of two stations to Silver King Broadcasting, a home shopping broadcaster, the Commission stated that

> We view this relatively new "format" as an example of licensee experimentation and regulatory flexibility. Although not in the same manner as contemplated in connection with ***advertiser-supported*** television, marketplace forces are applicable here. The format will not be sustained if the sales generated do not support the operation of the television station****We conclude that the type of ***programming*** involved here, based on the record before us, is consistent with the public interest.

Family Media Inc., 2 FCC Rcd 2540, 2542 (1987) *aff'd UCC v. FCC*, 911 F.2d 803 (D.C. Cir. 1990). [Emphases added]. *See Silver King Broadcasting of Vineland*, 5 FCC Rcd 7499, 7501 (1990) ("[P]etitioners have failed to state how such programming would amount to an abuse of a licensee's programming discretion. Home shopping formats are not *per se* a violation of a licensee's programming discretion.")

The Commission again addressed the nature of home shopping services when it granted Home Shopping Network ("HSN") a waiver from the dual network and prime time access rules. *Applicability of 47 CFR §73.658(g) and 47 CFR §73.658(k) to Home Shopping, Inc.*, 4 FCC Rcd 2422 (1989). In that decision, the Commission described HSN service as

> ***[P]rogramming*** of the Home Shopping Club. This ***programming*** is divided into segments that are broadcast live with a host who presents merchandise available for purchase by viewers. HSN also provides an overnight ***programming*** service, HSN Overnight, to 19 UHF stations. HSN Overnight ***programming*** has the same format but a different content from HSN2 ***programming***.

Id. at 2422. [Emphases added]. The Commission also understood that, contrary to what it now asserts, home shopping services are ***not*** advertiser supported:

> HSN is not involved in the production or acquisition of traditional entertainment programming. ***Nor must HSN program to attract national advertisers since it is not dependent on national advertising for its revenues.***

Id. at 2425. [Emphasis added].

Three years later, in its *Report and Order* implementing Section 4(g) of the 1992 Cable Act, the Commission referred to home shopping variously as a "service," a "format," "programming" and a "programming format." It never described it as a "commercial advertisement." *Home Shopping Station Issues Report and Order*, 8 FCC Rcd 5321 (1993). For example, in finding that stations predominantly devoted to home shopping serve the public interest, the Commission stated that:

> Indeed, the record clearly demonstrates that market forces have revealed a desire among a significant number of television viewers for ***home shopping programming.***

Home Shopping Station Issues Report and Order, 8 FCC Rcd 5321, 5326-7 (1993) [Emphasis added].

Similarly, in rejecting the cable industry's arguments that must carry for broadcast home shopping stations would unfairly disadvantage nonbroadcast home shopping services, the Commission stated:

> Proponents of that view seem mistakenly to assume that [Home Shopping Network] for example, could enjoy two channels on a cable system, one broadcast and the other nonbroadcast. However, cable operators are not required to carry specific cable home

> shopping programming providers****Finally, we note that Congress expressly based the 1992 Cable Act on a finding that vertically integrated cable systems have an incentive and ability to favor their affiliated programmers. ***We find no evidence in the record that Congress's general finding is not applicable to the specific environment of home shopping programming.***

Id. at 5326. [Emphasis added].

The *Home Shopping Issues Report and Order* contains similar language throughout, as does the *Notice of Proposed Rulemaking* that preceded it. *See generally, Home Shopping Station Issues Notice of Proposed Rulemaking*, 8 FCC Rcd 660 (1993) ("A home shopping station presents programming that offers for sale a variety of goods or services, soliciting viewers to purchase such goods directly from the programmer.")

b. Infomercials

The Commission has also considered "infomercials" (known also as "program length commercials")[5] to be programs[6] and have differentiated them from regular commercial spot advertisements. For example, in its *Policy Statement on Program Length Commercials*, 44 FCC 2d 985 (1974), the Commission found that a program-length commercial occurs "***when no formal commercial spot announcements, as such, are broadcast*** but the presentation is sponsored and the ***program*** clearly is devoted to promoting the sponsor's products or services...." *Id.* at 987. [Emphases added]. *See Deregulation of Radio*, 84 FCC2d 968, 1007 (1981) ("[O]ur present poli-

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[5]*See Cablevision of Cleveland*, 12 FCC Rcd 15173, 15182 (1997)(equating "program length commercials" with "infomercials.")

[6]*E.g., Liability of Turner Broadcasting*, 49 FCC 2d 1157 (1974) ("Because any educational or entertainment content of the ['National Chinchilla'] ***program*** was incidental to the commercial promotion of the products and services of the ***program's*** sponsor and because the commercial promotions are so interwoven with the 'non-commercial' segments, the Commission considers the entire ***program*** to be a program-length commercial....") [Emphases added].

cy discourages the use of 'program length commercials' which may be very useful to consumers where products or services cannot be adequately explained in the usual spot advertisement.")

The Commission further highlighted the difference between commercial spot announcements and program-length commercials in an example discussed in the *Policy Statement:*

> (Q) The furniture retailer buys one half-hour of time. No commercial spots are presented. The program is presented live from the sponsor's showroom each week and features an employee of the station discussing the sponsor's new furniture line and displaying the sponsor's furniture arranged in different suites.... Periodic statements are made identifying the furniture as available for sale at the sponsor's showrooms,****
> (A) ***Although no commercial spots are presented***, it appears that the program's format, the use of only the sponsor's furniture, and the repeated references to the sponsor and to the fact that the furniture is available at the sponsor's showrooms make this broadcast a program-length commercial.

Id. at 988. [Emphasis added].

Similarly, in *Topper Corporation,* 21 FCC 2d 148 (1969), the Commission found that a 30 minute cartoon program featuring the Mattel car toy "Hot Wheels" should be logged by stations as "commercial matter." In that decision, the Commission consistently referred to the cartoon as a program or a format, and it specifically differentiated it from regular Hot Wheels commercial advertisements:

> There can be no doubt that this [sic] program Mattel receives commercial promotion for its products beyond the time logged for commercial advertising. Nor is there any doubt that the program was developed with this promotional value, as well as its entertainment value, in mind. The producer designed a format which promotes the product of a major television advertiser of toys; used the trade name of the product as the title of the program, thus identifying the program; and sold the program to a network which broadcasts a substantial amount of advertising for the advertiser.****This pattern subordinates programming in the interest of the public to programming in the interest of its saleability. ***There is, we believe, sufficient basis for concluding that more of the program than the formal commercial spots should be logged as commercial matter.***

Id. at 149 [Emphasis added]. Thus, although the Commission has considered infomercials to

be commercial "matter," it clearly believes them to be different than "formal commercial spots."[7]

3. Industry Pronouncements

Those who produce and broadcast home shopping and infomercial services also refer to those services as "programming" and "programming formats." Indeed, they reject the idea that their services are merely "commercial advertisements."

The comments and reply comments filed in the Commission's Section 4(g) proceeding by the Silver King Communications, a licensee of full time home shopping stations, are typical. In urging that the Commission find that stations predominantly devoted to home shopping serve the public interest, Silver King consistently referred to its service as "programming," stating that

> home shopping programming is the functional equivalent of more conventionally-formatted stations' entertainment programming. It is commercial in nature, but it is entertainment nonetheless.... Moreover, as entertainment, home shopping programming is no less objectionable -- or less entitled to First Amendment protection -- than the quiz shows, reruns of old movies, sexually-oriented talk shows, violent drama, detective series and risque comedy programs which comprise the bulk of entertainment on contemporary television.
>
> The home shopping format, while unconventional, is...precisely what the Commission contemplated when deregulating station's commercial practices. No television station had aired such programming before HSN introduced the format. Indeed, HSN's entertainment format introduced the first practical application of interactive television. Never

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[7]The Commission's description of the Hot Wheels program reinforces this view:

> The children's cartoon series...carries the same name as a line of miniature racing cars manufactured by Mattel.... The producer of the series...retained the staff of...Mattel's advertising agency as its agent for the successful sale of the program to ABC. ***Mattel, in turn, in addition to the purchase of a number of minutes of commercial time in other ABC Saturday morning programs, purchased at least 3 minutes of advertising in the "Hot Wheels" program and is identified as the sponsor of the program. ABC states that in order to avoid confusion, Mattel's commercials on the cartoon series do not mention its "Hot Wheels" racing cars, although the cars are advertised on other Saturday morning programs.***

Id. at 148.

> before had a broadcaster sought to use the airwaves to facilitate interaction between viewers and the programmer.

Silver King Comments filed in MM Docket No. 93-8, March 29, 1993 at 19-20. *Accord*, Home Shopping Network, Inc. Comments filed in MM Docket No. 93-8, March 29, 1993 at 22-23; National Association of Black Owned Broadcasters Comments filed in MM Docket No. 93-8, March 29, 1993 at 3. ("In deciding whether stations carrying home shopping programming should be accorded the same cable carriage rights as other commercial television stations, the Commission should recognize that the only legitimate question from a content perspective is whether the programming falls into the categories of prohibited programming which the Commission has the authority to preclude or limit.")

In its reply comments, Silver King took pains to distinguish its home shopping service from commercial advertisements. In responding to an argument that the Commission consider spot commercials as well as home shopping programming to determine whether a station is "predominantly utilized" for home shopping, Silver King argued that

> Such action would ignore ***the clear distinction between spot advertising and home shopping programming***, a distinction which Congress obviously understands but which [the commenter proposing the argument] apparently cannot grasp.

Silver King Reply Comments in MM Docket No. 93-8, April 27, 1993 at 11 n. 21. [Emphasis added] It is apparent then that other than this Commission, no party that produces, regulates or watches home shopping and like programming considers it to be akin to "commercial advertisements used to support free over-the-air broadcasting."

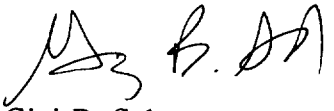
CONCLUSION

The Commission's cannot ignore the plain meaning of Section 336(e) of the Communications Act - fees must be imposed on digital TV services "for which the licensee directly or

indirectly receives compensation from a third party in return for transmitting material furnished by that third party." Home shopping, infomercial and direct marketing programming fall squarely within this definition, and are not "commercial advertisements" exempt from such fees. Moreover, the Commission cannot "grandfather" this programming from fees without express Congressional authority. Thus, the FCC must reverse its *R&O* to the extent that it declines to impose such fees on home shopping, infomercial and direct marketing services.

Wherefore, the Commission should grant UCC, *et al.*'s petition for reconsideration of Paragraphs 39-40 of its *R&O* and grant all other relief as is just and proper.

Respectfully submitted,



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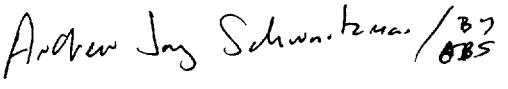

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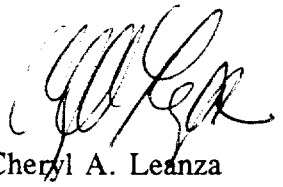

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